IN THE

Circuit Court of Appeals of the United States

FOR THE NINTH CIRCUIT

GIBSON PACKING COMPANY, a corporation,

Appellant,

vs.

ALEX McK. VIERHUS, Collector of Internal Revenue for the District of Washington, and

ROSCOE L. TIPPLE, Deputy Collector of Internal Revenue for the District of Washington,

Appellees.

No. 7973

APPELLANT'S BRIEF

APPEAL FROM AN ORDER BY THE HONORABLE J. STANLEY WEBSTER, JUDGE, DENYING APPELLANT AN INJUNCTION PENDENTE LITE

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After the appellant had completed writing its brief in support of its application for injunction pending appeal and had filed the same, it was advised that its appeal from the order denying it an injunction pendente lite had been set down for hearing on November 19th. The issues before the Court both in Appellant's application for injunction pending appeal and on its appeal from the order denying it an injunction pendente lite are exactly the same. While Appellant feels that its brief in support of its application for injunction pending appeal is adequate as an opening brief, yet, due to the fact that the shortness of time will not permit the Appellant to file a reply brief in reply to Appellee's answering brief, Appellant desires in this brief to cover certain points which it feels sure the Appellee's will raise in their brief and present to this Court for consideration.

The Appellees will undoubtedly contend that the Amendments to the Agricultural Adjustment Act as of August 27, 1935, have corrected any defects which may have existed in the Agricultural Adjustment Act prior to that time. Appellees will undoubtedly contend that Sec. 21 (a) of the Agricultural Adjustment Act as Amended of August 27, 1935, which reads as follows:

> "No suit, action, or proceeding (including probate, administration, receivership, and bank-

> ruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title *on or after the date of the adoption of this amendment*, or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. * * *"

bars Appellant's right to maintain the present suit. However, this section, by its express provisions, does not apply to any suits which were instituted prior to the date of its adoption. Appellant's action had been pending practically a month prior to the adoption of this act, and it could not, by any form of legal reasoning, be contended that the enactment of this section would deprive Appellant of the rights it then had. It is Appellant's position that the Agricultural Adjustment Act is unconstitutional and, being unconstitutional, Appellant has a vested right to the moneys which Appellees are seeking to recover. This vested right could not be deprived by the subsequent enactment of legislation.

Appellees will next undoubtedly contend that Sec. 21 (b) of the A. A. A. as amended of August 27, 1935, has ratified the delegation of legislative authority and, for that reason, Appellant is now precluded from attacking the constitutionality of the Agricultural Ad-

justment Act by reason of the unlawful delegation of legislative authority.

This section reads as follows:

> "The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes (together with penalties and interest with respect thereto)prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of agriculture or of the President done or made prior to the date of the adoption of this amendment."

Appellant contends that Section 21 (b) of the amended Act does not render valid the taxes imposed prior to August 27, 1935. It is true that Section 21 (b) of the amended Act purports to legalize, ratify and confirm the taxes theretofore imposed, and, by this device, Congress has sought to avoid the effect of its initial violation of the principle

that legislative powers cannot be delegated and to cure any defect in processing taxes on that score. Appellant's on this point will probably rely upon the case of *U. S. vs. Heinszen*, 206 U. S., 370. But, it is submitted by Appellant that, if Congress is incompetent in the first instance to delegate its legislative powers, then it cannot later ratify action taken pursuant to such invalid delegation. Its attempt to ratify an invalid creation of authority is an attempt to do again what it is constitutionally incapable of doing.

It is fundamental that only such acts can be ratified as could originally have been delegated. Such is the well-established law of agency. See American Law Institute, *Restatement of the Law of Agency*, Section 84 (2). The same principle limits the power of the legislature to cure, by subsequent ratifying legislation, defects in the authority of administrative officers. It is thus stated in *United States vs. Heinszen & Company*, supra, at page 382:

> "That where an agent without precedent authority, has exercised in the name of a principal a power *which the principal had the capacity to bestow*, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification as to matters within their authority may be exercised by Congress, state governments or municipal corporations, is also elementary." (Italics ours.)

In all cases in which subsequent ratification by the legislature has been held to cure action taken by administrative officers whose authority was defective, the Court had first to determine whether the legislature could originally have delegated performance of the acts which it seeks to ratify. In the case of *Mattingly vs. District of Columbia*, 97 U. S. 687, the Court, in holding that Congress might ratify action taken by the board of public works of the District, said at page 690:

> "If Congress or the legislative assembly *had the power to commit to the board* the duty of making the improvements, and to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized." (Italics ours.)

In *United States vs. Heinszen & Company*, supra, the Court upheld a statute ratifying the imposition and collection of tariff duties on goods imported and exported from the Philippine Islands on the ground that the power to proclaim a tariff with respect to the Philippine Islands might originally have been delegated to the President. It said at page 384:

> "Whilst it is admitted that Congress had the power to levy tariff duties on goods coming into the United States from the Philippine Islands or coming into such islands from the United States after the ratification of the treaty, it is

> yet urged that as that body was without authority to delegate to the President the legislative power of prescribing a tariff of duties, it hence could not by ratification make valid the exercise by the President of a legislative authority which could not have been delegated to him in the first instance. But the premise upon which this proposition rests presupposes that Congress in dealing with the Philippine Islands may not, growing out of the relations of those islands to the United States, delegate legislative authority to such agencies as it may select, a proposition which is not now open for discussion. *Dorr vs. United States*, 195 U. S. 133."

The decision in the Heinszen case was thus based on the fundamental proposition that Congress may delegate legislative authority with respect to the affairs of insular possessions of the United States. With respect to those possessions the constitutional doctrine of separation of powers does not apply, and Congress may make such provision for their government as it sees fit. That case, therefore, does not sustain the appellee's position here.

Since, with respect to the continental United States, Congress is plainly prohibited by the Constitution from delegating to an administrative official the legislative power to initiate a program of taxation and fix the rates of taxes, clearly it cannot adopt and render effective, ab initio, the taxes imposed pursuant to such unlawful delegation. Such purported ratification of

the exercise of a power which Congress could not have delegated in the first instance amounts to an attempt to tax retroactively the doing of an act long since completed. It is well settled that an excise tax, the liability for and incidence of which depend upon past lawful transactions, not subject to a valid tax when they took place, is arbitrary and capricious and amounts to confiscation contrary to the Fifth Amendment. The Supreme Court so held in *Untermyer vs. Anderson*, 276 U. S. 440, with respect to the retroactive feature of the tax imposed on gifts by the Revenue Act of 1924. The principles there announced are equally applicable to attempt to tax as of August 24, 1935, the processing of basic agricultural commodities which took place prior thereto. See also *Nichols vs. Coolidge*, 274 U. S. 531; *Levy vs. Wardell*, 258 U. S. 542, 544-545. We submit, therefore, that Section 21 (b) is not only ineffective as a ratification, but is also unconstitutional in that it attempts to lay an excise retroactively.

Appellees will also undoubtedly contend that Section 21 (d) of the A. A. A. as Amended in 1935, which reads as follows:

> "(1) No recovery, recoupment, set-off, refund or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty or interest which accrued be-

> fore, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, *it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court.* The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930." (Italics ours.)

gives to Appellant an adequate remedy at law and therefore precludes the granting of injunctive relief to Appellant. The Court will note that, under Section 21 (d) (1) it is provided that in any judicial proceeding relating to a claim for refund "a transcript of the

hearing before the Commissioner shall be duly certified and filed as *the* record in the case and shall be so considered by the court." It, therefore, appears that the Commissioner is the sole and final judge of the facts, and that no further evidence may be introduced in behalf of a taxpayer before the court.

The effect of this section is to deprive the Appellant in this case of its constitutional right to a trial of its case before a disinterested court of competent jurisdiction. That that is the construction that must be placed upon this section is shown by the Senatorial Debates, for Thursday, August 15, 1935, which contain the following:

> "Senator Borah: The court would have authority to take new evidence?"
>
> "Senator Smith: I think the record in this case, as in all tax cases, is made up here."
>
> "Senator Borah: And that record would be conclusive?"
>
> "Senator Smith: That record would be conclusive."
>
> "Senator Borah: *That is just the same as denying a man any right to go into court. That really nullifies the Senate provision.*"

Senator Borah then remarked—

> "Senator Borah: But the hearing is *before a political appointee;* that is, the Internal Revenue

> Commissioner. It is not before a judicial body but before a political body, and that political body, by its decision, determines whether or not the taxpayer is to have an opportunity in a judicial body."

In the same report Senator Johnson said:

> "The report (i. e., the conference report, which is the same as the act) hedges about the right of the individual in such fashion as to make it extremely difficult for that right to be exercised at all."

Later he said:

> "I can only voice the objection that is mine, and to say that I do not approve, and that I regret exceedingly that we have gone so far as we have in this conference report *in the endeavor to deprive the ordinary American of access to the courts of the land.*"

It seems clear to us that so interpreted Section 21 (d) (1) deprives the taxpayer of his property without due process of law, in violation of the Fifth Amendment. *Phillips vs. Commissioner*, 283 U. S. 589; *Graham & Foster vs. Goodcell*, 282 U. S. 409; *Lipke vs. Lederer*, 259 U. S. 557.

Appellees, in support of this contention that Section 21 (d) (1) affords Appellant an adequate remedy at law, will undoubtedly cite and rely upon the case of *U. S. vs. Jefferson Electric Manufacturing Co.*, 291 U. S. 386. This case dealt with an excise or sales tax

upon automobile accessories. It sustained a statute requiring as a condition of refund that the claimant prove that the amount of the tax "was not collected directly or indirectly from the purchaser * * * or * * * was returned to him." This case is not in point and can be distinguished on three grounds:

1. There is a vast difference between a tax on sales and a tax on processing. The tax in the Jefferson Electric case was based upon the sale price of an article sold, not as in the case at bar on the quantity of raw material going into the manufacture of that article. Consequently, the amount of the tax paid with respect to each article sold in the Jefferson Electric case was known beyond a question of doubt. The Supreme Court in that case on page 402 said:

> "If the taxpayer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing."

It will, therefore, appear that this language has no application whatsoever to the case at bar. In the case at bar, we have a live weight tax upon hogs which are slaughtered and over one hundred and fifty by-products made therefrom. It would be an absolute impossibility for a processor to determine what amount of tax should be pro-rated to each of these by-products. Then, again, these by-products are of a

perishable nature, and are sold from day to day on markets which vary each day and depend upon enumerable different circumstances. We submit that it would be an absolute impossibility for a taxpayer to prove before a Commissioner of Internal Revenue that he had not either directly or indirectly passed on any portion of the tax, or that he had not charged back either directly or indirectly to the producer of hogs any part of this tax. It would be an absolute impossibility for a processor, in view of the varying market prices for the numerous by-products, to determine what, if any, part of the tax had been passed on, and yet he is compelled to make this proof at his peril, and, failing to do so, he is precluded from recovery.

2. The statute under consideration in the Jefferson Electric case was not designed (as the statute here) to thwart recovery of tax at all costs. It had a provision permitting the manufacturer of automobile accessories to recover the tax upon furnishing security conditioned upon the repayment to its customers of any refund obtained. The statute in that case was designed to afford relief to those legally entitled to recover the tax. Section 21 (d) (1), on the other hand, affords no relief to the ultimate purchaser or consumer of articles processed even though it be shown that they have been forced to bear the whole burden of an invalid tax. The statute involved in the Jeffer-

son Electric case did not, as Section 21 (d) (1) does, thwart all constitutional restrictions upon the taxing power of Congress by imposing full and complete effectual bars to recovery of unconstitutional taxes.

3. Furthermore, the claimant in the Jefferson Electric case had actually paid the amount of the tax to the government and was seeking recovery. Since he had included the amount of the tax on his invoices he had no more right to the money than the government. The decision preserved the status quo as between two claimants, neither of whom was entitled to the money. In the case at bar the plaintiffs have their money. If Section 21 (d) (1) is regarded as precluding equitable relief by reason of the purely illusory remedy which it purports to afford, the result will be to permit unjust enrichment of the government. Since the tax is invalid, the government has no better right to it than the taxpayer. We submit that here, as in the Jefferson case, the status quo should be preserved until the validity of the government's claim has been determined, for, once the government is permitted to collect, the taxpayer will be without redress.

Appellant, in further support of its contention that a proper cause exists herein for the issuance of an injunction, cites *Union Pacific vs. Cheyenne*, 113 U. S.

516, and *Wallace vs. Hines*, 253 U. S. 66. In the case of *Union Pacific vs. Cheyenne*, supra, the Supreme Court, in sustaining an injunction against the collection of a tax, said at page 525:

> "It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. *For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief.* Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any ground for equitable interposition. In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of cloud upon the title of one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those

> the common law can give, and these, in proper cases, may be afforded in courts of equity.' This statement is in general accordance with the decisions of this court as well as of many State courts."

Similarly in *Wallace vs. Hines*, supra, in sustaining an injunction against the collection of a tax, the Supreme Court, speaking through Mr. Justice Holmes, said at page 67:

> "As the tax is made a first lien upon all the property of the plaintiff railroads in the State and thus puts a cloud upon their title, and as delay in payment is visited with considerable penalties, there is jurisdiction in equity unless there is an adequate remedy at law against the State, to which the tax is to be paid."

In conclusion, Appellant respectfully contends that the Agricultural Adjustment Act as Amended, sofar as it applies to Appellant, is unconstitutional, or at least that grave doubts exist as to the constitutionality of this particular law, and that, therefore, the equitable powers of this Court should be invoked and an injunction issued pendente lite, maintaining the parties to this action in status quo until a complete determination of all the issues herein presented can be had at a trial, and the ultimate validity of the Agricultural Adjustment Act determined. Unless an injunction pendente lite is issued, Appellant's case will be rendered moot inasmuch as the government will pro-

ceed to effectuate a collection of the taxes alleged due, and Appellant will thereby be deprived of its right to ultimately litigate the issues on the merits. The Appellant urges that the order denying it an injunction pendente lite be reversed, and that it be afforded the opportunity to have its case heard upon the merits.

Respectfully submitted,

NAT U. BROWN
C. W. HALVERSON
Solicitors for Appellant.

TABLE OF CASES CITED